NO. 21686
NO. 21868-A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANT ROMERO'S PETITION FOR REHEARING

APPELLANT ROMERO'S REQUEST FOR REHEARING IN BANC

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

625 South Kingsley Drive
Los Angeles, California

Attorneys for Appellants.

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I.

BRIEF STATEMENT OF THE CASE

On May 10, 1966, federal agents shot Appellant's car, viciously smashed him in the head with a gun butt, and arrested him without a warrant. Then the agents gave him an admittedly inadequate warning, interviewed him, and obtained an admission. One of the arresting agents then left the scene of the arrest, went to the United States Commission Office, and by utilizing

Appellant's post arrest statements he obtained a search warrant for Tickle's home. Appellant was not taken before the United States Commissioner, even though one of the arresting agents went before the Commissioner to obtain a search warrant. Appellant, as a prisoner, was taken by the agents to Tickle's home; he was compelled to go into Tickle's home, and he assisted in the search of Tickle's home during which time he made incriminating statements which were subsequently received in evidence against him at his trial. It was not until the next day that Appellant Romero was arraigned before the United States Commissioner.

On November 14, 1966, Appellant was sentenced to serve fifteen years in a federal penitentiary.

On November 14, 1966, Appellant filed his notice of appeal. Appellant has been at liberty on appeal bond for the past two and one-half years.

On September 30, 1967, Appellant filed his opening brief; the plaintiff filed a brief and Appellant filed a reply brief.

On March 4, 1968, oral argument was had, and this

Court took the matter under submission. Nearly one year later this Court handed down its brief written opinion in which it stated that, "Not one of appellants' nine specifications of error is worthy of discussion," and not one of the specifications was discussed.

II.

POINTS OF LAW AND FACTS THE COURT HAS OVERLOOKED

Appellant has filed two briefs and had extensive oral argument on six major specifications of error. This Court's opinion never reached any of the specified errors, but preemptively dismissed them by stating that the case turns on its facts, there are no unsettled questions of law, and there is no need to discuss the specified errors. Nearly two and one-half years have elapsed since Appellant's opening brief was filed and this Court handed down its opinion; nearly a year elapsed between oral argument and written opinion.

A. Appellant's arrest without a warrant lacked probable cause and is an illegal arrest.

On January 27, 1969, the United States Supreme Court in Spinelli v. United States, 37 L.W. 4110, reversed a conviction on the grounds that the search warrant obtained by the FBI was defective in that it lacked probable cause. There were three dissenting opinions.

The probable cause claimed by the government includes anonymous letters, months of surveillance, telephone record check, and an unidentified informant in another city without first-hand knowledge talking to unidentified agents, who in turn, talked to other agents.

If this Court will approach the facts in this case as the Supreme Court did in Spinelli, then the Appellant may well win his reversal.

It would seem that Appellant is entitled to have this Court analyze, weigh, decide and advise whether or not the arresting agents had anything more than rank suspicion.

Other than Appellant's post arrest admission, the evidence as to probable cause is also the total evidence of guilt beyond a reasonable doubt. The trial court had considerable difficulty with the motion to suppress, and were it not for the admittedly inadmissible

post arrest statements which were admitted, this Appellant probably would have been acquitted.

When there has been a serious professional attempt to appeal a conviction on the grounds that the evidence is insufficient, and the details of the insufficiency have been carefully delineated in the briefs and discussed in oral argument, then the litigants and their counsel are entitled to more from an Appellate tribunal than a statement that there is no merit in the appeal. Our jurisprudential history is such that lower courts, litigants, and counsel expect, need and have come to rely upon a full detailed, written appellate decision.

Here, perhaps because of the long lapse of time between the briefs and oral argument and the Court's decision, the Court has not fulfilled its traditional role of rendering a complete decision.

B. Appellant's post arrest statements were not admissible, and the government conceded that Appellant had been given an inadequate warning, yet some of these statements were used in a search warrant and all of these statements were received in evidence.

Federal agents shot Appellant's car, slugged him with a gun and fists, and arrested him without a warrant (and without probable cause). The agents then gave him what the government conceded at the trial was a legally insufficient warning under Miranda v. United States. Appellant, still bleeding, then made several admissions. These admissions, in spite of the government's concession that Appellant had not been adequately warned were admitted into evidence at the trial. The trial court expressed doubt about the admissibility of these statements at the hearing on the motion to suppress, and stated that the warning: "doesn't meet the Miranda standard," yet they were admitted. This Court is requested to re-examine, reweigh, and then detail its analysis, reasoning and conclusions in its written opinion as to the legality and propriety of the admissibility of such evidence.

Appellant's post arrest statements were taken to the nearest United States Commissioner without unnecessary delay, set down in an incomplete affidavit for a search warrant, and a search warrant issued. But Appellant was not taken before the Commissioner. Instead

the agents held him as a prisoner in the field and waited for the search warrant. When they had the search warrant and searched Appellant Tickle's home and found nothing, the agents then took Appellant Romero into the home and had him assist in the search. Appellant Romero made admissions during this search which were received in evidence (in spite of the above-mentioned concession) and which form the basis for his conviction on Count Two.

The next day Appellant was taken before the Commissioner. This is a classic case to illustrate a violation of Rule 5 (a) of the Federal Rules of Criminal Procedure, and the Supreme Court in Mallony v. United States, 354 U.S. 449, 77 S. Ct. 1356 (1957), clearly spelled out that statements made during a time when a prisoner has been held without a prompt arraignment are not admissible. It is difficult to conceive of a sharper illustration of a violation of Rule 5 (a). An arresting agent leaves the arrestee in the field and goes to the nearest United States Commissioner to secure a search warrant in which he utilizes the post arrest statements of the arrestee. If the agent can take the statements of the arrestee to the Commissioner and he doesn't take the arrestee

himself, the inevitable conclusion is that there was unnecessary delay in arraignment. And when the arrestee subsequently makes additional statements, while as a prisoner he is compelled to assist them search another man's home, then such statements can not be received in evidence. Here these statements were received in evidence, and this should explain why or how or if such statements are ever admissible.

There are additional reasons that were put forth challenging the admissibility of these statements: If there was no probable cause to arrest him (as he seriously contends), then under the holding of Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963) such statements are inadmissible; and can a beaten, bleeding, handcuffed prisoner make a statement within minutes after his arrest that this Court will say is voluntary in view of Stein v. New York, 346 U.S. 156 (1952).

Four separate, distinct, constitutional arguments were prepared, briefed and argued as to why Appellant's statements are not admissible:

1. He was not adequately warned pursuant to

Miranda, which was conceded by the government and noted by the trial court.

2. He was not promptly arraigned and his statements were obtained during a period of unlawful detention.

3. He was arrested without probable cause.

4. His statements were not voluntary in view of his condition as caused by the agents.

Any one of these arguments, standing alone, compels a reversal of this case by this Court. The answers to these problems do not merely turn upon the facts. What is unnecessary delay? Can agents be permitted to do what they did here -- if this Court doesn't explain the law in relation to these facts then agents have a right to conduct themselves in such a shocking manner. Is it permissible to give a faulty insufficient warning to an arrestee, have the government concede that the warning was defective, have the trial court comment that the warning was legally inadequate, and then receive the arrestee's statements into evidence? A discussion of

the facts will not resolve this issue; and a discussion of the law will not resolve this issue; but a detailed analysis of the facts and a reasoned application of the law to those facts will at least satisfy the various legal obligations of those involved.

These arguments do have merit, and should be dealt with by this Court in other than a summary, conclusive fashion. This Appellant has paid extremely high bail premiums to earn his liberty for the past year while this case was under submission, and counsel respectfully and sincerely urges this Court to reconsider this matter. If Appellant is to remain convicted, isn't he at least entitled to know why?

C. The search warrant in this case is fatally defective.

Since this case was briefed and argued, the United States Supreme Court by a divided Court decided the Spinelli case (supra) in which they analyzed, dissected and decided that a search warrant was defective. In the briefs in this case, counsel has gone to some lengths to analyze, appraise, dissect and argue the very points

set forth in the Court's majority opinion. This petition for rehearing is meant to be an articulate plea to this Court to at least explain wherein this Appellant's fifteen years in a federal penitentiary is legally warranted.

D. The evidence is insufficient to support Appellant's convictions.

Appellant's opening brief and his reply brief concentrated on a thorough review of the evidence and pointed out with specificity wherein the evidence was insufficient as to each count. Applicable law was cited and applied to the facts, but this Court without discussion merely states that it reviewed the record and finds no merit in the specified errors. Isn't this Appellant entitled to more from this Court? He is facing a fifteen-year sentence; he has been at liberty on bail since May of 1966 by paying thousands of dollars a year in bond premiums, he has hired and paid experienced competent counsel who have asserted their best effort on what they feel is a meritorious appeal for numerous reasons; and he has earned and deserves the analysis, reasoning and detailed written opinion of this Court.

III.

REQUEST FOR HEARING IN BANC

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellant requests a hearing in banc on this petition.

IV.

CONCLUSION

Appellant respectfully urges this Court to grant this petition for rehearing and allow additional briefs and argument.

There are grave issues of constitutional importance involved in this case, and Appellant's counsel who have had the advantage of years of practical trial and appellate practice in Federal Court urge this Court to reconsider its opinion and grant this petition. Other counsel have borrowed and read the briefs in this case and favored Appellant's counsel with their comments -- all of which have been to the effect that Appellant has a very meritorious case. This Court's opinion does not do justice to this Appellant, the trial court, the government personnel, the counsel or the briefs and arguments. Counsel is hopeful of persuading this Court that it must reverse the conviction,

but at the least counsel is hopeful of obtaining a detailed discussion and analysis in a written opinion that is reviewable.

Respectfully submitted,

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

By 
Thomas R. Sheridan

Attorneys for Appellant